Mount Desert Island Hospital *and* Malachy Grange.
Cases 1-CA-16082 and 1-CA-17599

December 8, 1981

DECISION AND ORDER

BY MEMBERS FANNING, JENKINS, AND ZIMMERMAN

On June 29, 1981, Administrative Law Judge Wallace H. Nations issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief, and the General Counsel filed a brief in support of the Administrative Law Judge's Decision.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,[1] and conclusions of the Administrative Law Judge and to adopt his recommended Order, as modified herein.[2]

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge, as modified below, and hereby orders that the Respondent, Mount Desert Island Hospital, Bar Harbor, Maine, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, as so modified:

1. Substitute the following for paragraph 2(a):

"(a) Offer Malachy Grange immediate employment in any nursing position for which he is qualified without prejudice to whatever seniority and other rights and privileges he would have enjoyed had it not discriminated against him, dismissing, if necessary to make a position available for him, any employee hired to a position he would have held but for such discrimination. In the event no such vacancy presently exists and no one has been hired for such a position since such discrimination, establish a preferential hiring list headed by Grange. If such a preferential hiring list is established, offer Grange employment immediately upon the development of a vacancy for which Grange qualifies."

2. Substitute the attached notice for that of the Administrative Law Judge.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

WE WILL NOT refuse to rehire or otherwise discriminate against our employees in regard to hiring or tenure of employment or any term or condition of employment because they engage in concerted activities protected by Section 7 of the National Labor Relations Act.

WE WILL NOT blacklist our employees or in any like or related manner interfere with, restrain, or coerce employees in the exercise of their rights to engage in or refrain from engaging in any or all of the activities specified in Section 7 of the Act.

WE WILL offer Malachy Grange immediate employment in any nursing position for which he is qualified without prejudice to whatever seniority and other rights and privileges he would have enjoyed had we not discriminated against him, dismissing, if necessary to make a position available for him, any employee hired to a position he would have held but for such discrimination. In the event no such vacancy presently exists and no one has been hired for such a position since such discrimination, WE WILL establish a preferential hiring list headed by Grange. If such a preferential hiring list is established, WE WILL offer Grange employment immediately upon the development of a vacancy for which Grange qualifies.

WE WILL make Malachy Grange whole for any loss of earnings he may have suffered as a result of our refusal to reemploy him, with interest.

MOUNT DESERT ISLAND HOSPITAL

DECISION

STATEMENT OF THE CASE

WALLACE H. NATIONS, Administrative Law Judge: Upon a charge brought in Case 1-CA-16082 on May 16,

[1] In affirming the Administrative Law Judge's finding that Malachy Grange's letter to the Bar Harbor Times constituted concerted activity, we note that prior to sending the letter, which included complaints about employee wage levels and working conditions, Grange engaged in discussions with fellow employees regarding alleged deficiencies in pay, benefits, and working conditions at Respondent's facility.

[2] The Administrative Law Judge recommended that Respondent be ordered to employ Grange in any nursing position for which he qualifies, or the first available position. We find, however, that the appropriate remedy is to require Respondent to offer immediate employment to Grange and, if necessary, to dismiss any employee hired since the discrimination against him into a position for which Grange qualifies. We have therefore, in accordance with this finding, modified the recommended Order and substituted a new notice.

Member Jenkins would compute the interest due on backpay in accordance with his partial dissent in *Olympic Medical Corporation*, 250 NLRB 146 (1980).

1979, and a charge brought in Case 1-CA-17599 on June 30, 1980, complaints were issued on June 21, 1979, and August 18, 1980. The order and complaint of August 18, 1980, consolidated the two cases and alleges that on three occasions in 1979 and 1980, Mount Desert Island Hospital (Respondent) refused to rehire Malachy Grange, and on one occasion in 1979, attempted to cause another employer to refuse to hire Grange, for the reason that Grange had engaged in protected concerted activities for the purposes of collective bargaining or other mutual aid or protection and for the reason that he filed charges under the Act, and by its actions, Respondent has violated Section 8(a)(1) and (4) of the Act. Respondent's answer and motion to dismiss denies these allegations. A hearing was held on March 17 and 18, 1981, at Bar Harbor, Maine. Briefs were received from both General Counsel and Respondent on or about April 29, 1981.[1]

Upon the entire record in this case and from my observation of the witnesses and their demeanor, I make the following:

FINDINGS AND CONCLUSIONS

I. THE BUSINESS OF RESPONDENT

Respondent is a hospital providing medical services to the general public at its facilities in Bar Harbor, Maine. Respondent has annual gross revenues in excess of $250,000 and annually purchases goods and supplies valued in excess of $50,000 per year from points outside the State of Maine. I find that Respondent is an employer within the meaning of the Act and that it will effectuate the policies of the Act to assert jurisdiction in this case.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Alleged Refusal To Rehire Grange During 1979 and 1980*

1. Background and facts

Respondent is a health care institution located in Bar Harbor, Maine, and is licensed for 66 acute patient care beds. In September 1977, Grange was hired by Respondent as a licensed practical nurse (LPN). Commencing around May 1978, Grange engaged in discussions with other staff members pertaining to low pay, poor benefits, job security, and no seniority system, as part of the working conditions at Respondent's hospital. Grange, thereafter, complained about Respondent's working conditions such as staff shortages, by bringing it to the attention of Director of Nursing Louise Dunne, and Assistant Director of Nursing Margaret Sprott. Grange also submitted signed written complaints about working conditions and placed them in the hospital's suggestion box.

Upon receiving no response to these complaints from the hospital's administration, Grange sent a letter to the editor of the Bar Harbor Times on or about July 3, 1978, and it was printed in the newspaper on July 6, 1978. In general, the letter complained about working conditions at the hospital, employee wage levels, and the level of patient care given by the hospital. The exact text of this letter is appended to this decision as "Appendix B [omitted from publication]."

On July 6, 1978, Grange invited Don Snyder, the editor of the Bar Harbor Times, to attend a staff meeting at Respondent's hospital, for the purpose of verifying from the staff employees the working conditions that were referred to in Grange's published letter. At the staff meeting, which was attended by approximately 30 staff employees, the employees stated their complaints for the benefit of the newspaper. The complaints related to low pay and benefits, lack of security, inadequate staffing, and patient care. On July 6, 1978, at Respondent's parking lot, Grange met Respondent's administrator, Charles Lotreck, and introduced himself to Lotreck by stating, "Mr. Lotreck, I am Mal Grange. Did you read my letter and what did you think about it?" Lotreck did not reply.

On July 13, 1978, letters in response to Grange's letter, that appeared in the prior edition of the newspaper, were published in the Bar Harbor Times, and generally supported Grange's criticism of the working conditions at the hospital. On July 20, 1978, additional followup letters in support of Grange's criticism of Respondent's working conditions were published in the local newspaper. On or about July 20, 1978, Grange was responsible for circulating a petition among his coworkers requesting the community and board of trustees of the hospital to investigate the working conditions at the hospital and bring about needed changes. Approximately 105 staff employees signed the petition, including Supervisors Len Sweet, Norma Spurling, and Paula Knutsen. Grange gave a copy of the petition to the Bar Harbor Times and another copy was placed in Assistant Administrator Paul O'Neill's box at Respondent's hospital with an attached note from Grange requesting him to pass the copy of the petition to Respondent's board of trustees. The petition, with an editorial, and additional followup letters were printed in the Bar Harbor Times on July 28, 1978.

During August 1978, at Grange's request, a staff meeting was held at Respondent's hospital, which was attended by the Bar Harbor Times' editor and by Christopher Spruce of the Bangor Daily News. Director of Nursing Dunne, upon being informed that two newspaper reporters wanted to attend the staff meeting, immediately checked for approval from Lotreck. Lotreck denied approval. Dunne stated that her concern was that no one from management should stay at the staff meeting. Lotreck agreed and stated, "You know a lot of people on the board question why Mal Grange has been seen in your office prior to this meeting."

In December 1978, Grange voluntarily left the employ of Respondent to prepare for his state board examinations to become a registered nurse. Grange took the examinations in February 1977 and was notified that he was successful in passing the examinations as of March 1979. During February 1979, Grange phoned Respondent's Director of Nursing Dunne and inquired about summer employment as a registered nurse at Respondent's hospital. Dunne responded that she had a nursing shortage on the night shift and offered Grange a position

[1] Certain errors in the transcript are hereby noted and corrected.

immediately as a graduate nurse on the night shift beginning in February 1979. Grange declined the offer of immediate appointment because his plans were indefinite.

In a letter dated March 13, 1979, from Grange to Dunne, Grange requested an application and consideration for employment. On or about March 27, 1979, Dunne received a phone call from Grange inquiring about prospective summer employment with Respondent. The discussion related to possible nursing positions available and Dunne informed Grange that there were nursing positions available and specifically mentioned the emergency room position on the 3 to 11 p.m. shift. Dunne indicated that she would consider Grange hired pending submission by him of an application. Dunne complied with Grange's request by sending him an application on the following Monday, April 2, 1979. Prior to Dunne leaving on vacation from March 31, 1979, through April 15, 1979, she informed her assistant, Margaret Sprott, that she had a telephone conversation with Grange and discussed the opening position in the emergency room and that as far as she was concerned, Sprott could hire Grange.

On or about April 3, 1979, Grange phoned Respondent's hospital and spoke to Sprott. Grange mentioned that he had spoken to Dunne the previous week and knew that she was now on vacation, but that he had filled out an application and would like to apply for the emergency room, 3 to 11 p.m. shift for the summer of 1979. Sprott replied that she considered Grange hired and inquired as to when he could report. Grange responded that he was not sure of the exact date but that it would be sometime in June. Sprott requested that he notify them of the exact date he would report. Following this telephone conversation, Sprott discussed with staffing secreatry Eileen Holmes putting Grange on the schedule for the 3 to 11 p.m. shift in the emergency room and decided to wait until Grange let them know the exact date he would start. On April 4, 1979, Grange gave his completed application form to Mary Rewa, a nurse at Respondent's hospital, who delivered it to the nursing office.

On or about April 17, 1979, Sprott informed Dunne that she had hired Grange and that he would be informing them of when he could report to work. On April 17, 1979, Dunne informed Lotreck that Sprott had hired Grange while she was on vacation. Lotreck became upset and replied that he did not see how Sprott could have ever done such a thing with all the trouble Grange had caused the hospital the previous summer.[2] Lotreck then instructed Dunne to get in touch with Grange immediately to tell him there would be no position available for him at Respondent's hospital. Dunne phoned Grange on April 17, 1979, and disclosed the contents of her conversation with Lotreck. Dunne mentioned that it was Lotreck's position that Respondent had more than enough applicants for nursing positions and did not anticipate needing Grange. Grange inquired whether anything could be done about it and Dunne replied in the negative.

The final approval of all hiring at Respondent's hospital must be by the hospital's administrator, Lotreck. As noted in the Hospital's Personnel Policy Manual:

> Applicants will be given a preliminary interview by their prospective department head to ascertain their ability to meet the job requirements. Final approval of the administrator is required prior to hiring new personnel.

This policy was in effect at all times relevant to these proceedings.

On April 18, 1979, Dunne informed Lotreck that she had contacted Grange and carried out Lotreck's instructions, but that Grange was upset over Lotreck's decision not to hire him and that Grange might take legal action. On April 18, 1979, a directive was issued by Lotreck to the department heads at the hospital requiring that all applicants for employment go through the personnel department before any final decision is made to hire such applicant. On or about May 2, 1979, Lotreck instructed Respondent's assistant administrator, Paul O'Neill, to contact the administrator of Sonagee Estates and inform him that it would be in the best interest of Sonagee if he did not hire Grange. This action is discussed at a later point in this decision.

In September 1979, Grange went back to Portland, Oregon, which he considered his second home. On March 4, 1980, Grange applied by mail as a registered nurse at Respondent's hospital in emergency room or med./surg., and indicated a willingness as to flexibility in work and hours for summer employment. Respondent's new director of nursing, Dorothy Osborne, responded in a letter dated April 6, 1980, informing that Respondent did not need any summer nurses, nor did it anticipate the need for any nurses, but that it would keep Grange's application on file. Immediately prior to sending this response to Grange's inquiry, Osborne had spoken to Lotreck. Although Lotreck never told Osborne not to hire Grange at this point, Osborne concluded on her own that Lotreck would probably not give final approval to the hiring of Grange while other qualified candidates were available. Because of a prior commitment made at the end of the prior summer's employment, the hospital did hire one LPN, Elizabeth Muckel, as a summer employee. The hospital prefers to hire non-RN's to assist in the summer. Statistics introduced by Respondent indicated that a greater percentage of Respondent's nursing care is delivered by registered nurses in institutions of similar size. The percentage of nursing care delivered by LPN's is lower than at other institutions. With the RN staff at a comparatively high level, and an increase in patient census in the summer, the hospital's position is that it is reasonable to respond to the increased demand by hiring less costly aides and LPN's. There was no evidence presented to show that the hospital hired additional, nonspeciality RN's for regularly scheduled shifts during the summer.

The hospital used the services of The Traveling Nurse Corps (TNC), in the winter of 1979-80. TNC is similar

[2] Grange's letter, attached as "Appendix B [omitted from publication]," and the public reaction to the letter noted above led to the hospital's decision to terminate its *Capital Fund Drive*, evidently causing the hospital serious financial harm.

to "Manpower, Inc." in that it can provide experienced registered nurses with speciality skills on a temporary basis. TNC nurses were used to fill vacancies for which the hospital was attempting to hire permanent RN's with speciality skills. No general duty (alternately referred to as med./surg.) nurses were hired from TNC. Only those who had experience in specific speciality skills were requested by Respondent. Specifically, nurses were provided by TNC who had experience in intensive care and obstetrical services as well as those who had experience in supervising a shift on a floor (charge nurse). Both nursing Directors Dunne and Osborne agreed that those RN's with "specialities" are not always able to exclusively practice within these "specialities." Hence, when there are no patients in need of coronary or obstetrical care, RN's with specialities may be assigned to assist in med./surg., or other areas of the hospital.

On June 14, 1980, Grange visited the Bar Harbor area and spoke to Respondent's staff doctor, William Horner. Dr. Horner informed Grange that as far as he knew there was an opening at Respondent's hospital for a RN on the 3 to 11 p.m. shift in the emergency room. Dr. Horner further stated that the emergency room was busy enough, that it was Respondent's policy to have a full-time nurse in the emergency room on the 7 a.m. to 3 p.m. day shift and 3 to 11 p.m. shift, and that he was concerned that no one had been hired as yet.

On June 17, 1980, Grange approached Respondent's director of personnel, David Matlack, and inquired about the possibility of being hired by Respondent. Matlack replied that Respondent was not hiring any nurses for summer employment, but were seeking to hire nurses who would stay over the winter, particularly speciality nurses. Following his conversation with Matlack, Grange went to speak with Director of Nursing Osborne. Osborne indicated that the hospital was not looking for summer applications and that her most pressing need was night-shift nurses, particularly speciality nurses for full-time employment. Grange countered that he knew that Elizabeth Muckel was being employed for the summer only and was basically a med./surg. nurse. Osborne noted a prior commitment to Muckel.

On or about June 23, 1980, Grange visited Respondent's hospital and met with Osborne again. At this meeting, Grange changed his application from one seeking summer employment to one seeking full-time employment. Osborne responded that she would get in touch with Grange. On June 25, 1980, Grange phoned Osborne to inquire about whether a decision had been made about his job application. Osborne replied that the only kind of nurses Respondent wanted were speciality nurses and that it did not need med./surg. nurses at all. The hospital did not hire any med./surg. registered nurses during the summer of 1980. However, Osborne did provide Grange's name to Maine Coast Memorial Hospital, a hospital of similar size in Elsworth, Maine, located 20 miles from Mount Desert Island Hospital. Grange rejected employment at Maine Coast Memorial and after spending the summer in Bar Harbor, returned to Oregon.

2. Contentions and conclusions

Respondent's initial defense in this proceeding is that Grange's actions were on an individual basis only, and not on behalf of other hospital employees. The record shows this to be clearly wrong. Grange's letter to the Bar Harbor Times clearly makes reference to working conditions of all of the nursing staff. Moreover, his ability to organize a staff meeting attended by a large number of the hospital nurses and subsequent ability to successfully circulate a petition complaining of working conditions reflects the support Grange had from his coworkers. Thus, I find that Grange's actions did constitute concerted activities on behalf of the hospital's employees generally.

The next and most serious question raised is whether Grange's concerted activities are protected under the Act.

An analysis of the discharge or failure to rehire an employee for activities which are protected under Section 7 begins with the Supreme Court's decision in *N.L.R.B.* v. *Local Union No. 1229, International Brotherhood of Electrical Workers (Jefferson Standard Broadcasting Company)*, 346 U.S. 464, 481 (1953). In that case, the employer discharged striking employees who distributed handbills disparaging the quality of the employer's product and its business policies in a manner reasonably calculated to harm the company's reputation. The Supreme Court held that while Section 7 did safeguard the rights of employees to engage in concerted activities for mutual aid or protection, Section 7 was not intended to "weaken the underlying contractual bonds and loyalties of employer and employee." However, as noted in the dissent by Justices Frankfurter, Black, and Douglas:

> The Board and the courts of appeals will hardly find guidance for future cases from this Court's reversal of the Court of Appeals, beyond that which the specific facts of this case May afford.

As predicted in the dissent in *Jefferson Standard*, the cases following it determining whether a particular activity was protected turn significantly on the facts. Respondent relies on the Board's decisions in *Coca Cola Bottling Works, Inc.*, 186 NLRB 1050 (1980), and *Firehouse Restaurant*, 220 NLRB 818 (1975), two cases in which an employee or employees publicly alleged that their employers' product was harmful to their customers' health. In both cases, the activities were found to be unprotected. It also cites *American Arbitration Association, Inc.*, 233 NLRB 71 (1977), and an advice memoranda issued by the Division of Advice, *University of Southern California Security Department*, 99 LRRM 1728 (1978), wherein it was concluded that remarks made during television interviews by campus security officers which were critical of security conditions on the university campus were not protected. Associate General Counsel Datz concluded that the remarks made "would tend to embarass the university's reputation, community relations, and security."

General Counsel relies on a line of cases including *United Parcel Service, Inc.*, 234 NLRB 223 (1978), *Spring-*

field Library and Museum Association, 238 NLRB 1673 (1979), and *The Reading Hospital and Medical Center*, 226 NLRB 611 (1976). In *Springfield*, an employee of the Association published an article in the union newsletter which stated, *inter alia*, that Respondent's chief administrator was:

> . . . a man who never "lost contact" with working professionals because he never had it to begin with. He is simply a man who, when he lost his job at Forbes & Wallace, was put on a form of welfare-for-the-rich courtesy of his friends on the Board of Trustees.

In that case, Respondent argued that the employee went too far, that her statements were libelous, *per se*, that she insulted a management official, and that such statements by an employee were neither acceptable nor permissable. In reversing the Administrative Law Judge who agreed with Respondent, the Board stated at 1673–74 that:

> Clearly the Administrative Law Judge erred. Specificity and/or articulation are not the touchstone of union or protected concerted activity. Rather, the issue to be addressed is the question of whether or not the comments are related to concerted or union interests. Once the concerted nature of the words is established (as formed by the Administrative Law Judge), Respondent had the burden to show that the words were published with knowledge of their falsity or with reckless disregard of whether they were true or false. In *Letter Carriers*, 418 U.S. at 283, the Supreme Court stated: [footnote omitted]
>
> > But *Linn* recognized that federal law gives a union license to use *intemperate, abusive*, or *insulting language* without fear of restraint or penalty if it believes such rhetoric to be an effective means to make its point. [Emphasis supplied.]
> >
> > * * * * *
>
> In short, Glendon's message to her fellow employees is that they have work-related problems and suggests that one of the reasons for these problems is the manner in which Respondent's administrators are chosen. Respondent's management may very well have been offended by Glendon's "rhetorical hyperbole," but, as the Court said in *Linn, supra* at 63:
>
> > . . . the most repulsive speech enjoys immunity provided it falls short of a deliberate or reckless untruth.
>
> Since Glendon's article clearly is protected concerted union activity, immune from restraint or interference under state libel laws, *a fortiori* this same conduct is immune from restraint or interference by an employer's disciplinary actions. [Footnote omitted].

Two other cases were cited by Respondent which would support a finding that the letter and subsequent activity of Grange were protected. In *Richboro Community Mental Health Council*, 242 NLRB 1267 (1979), an employee was denied a promotion because of statements made in a letter which was distributed to an assortment of agencies which funded and/or reviewed the employer. The Administrative Law Judge found that portions of the employee's letter criticizing the employer's administration and chairman of the board were unprotected. The Board disagreed, finding that the purpose of the letter was to complain about the discharge of a fellow employee and that the criticism of the employer's operation were merely cited in support of his major contention that the charging party's fellow employee had been wrongfully discharged.

Another case in which the activity of health care employees was found to be protected was *Community Hospital of Roanoke Valley, Incorporated* v. *N.L.R.B.*, 538 F.2d 607 (4th Cir. 1976), enfd. 220 NLRB 217 (1975). The dispute arose in the context of an organizational attempt by the Virginia Nurses Association of registered nurses at Roanoke Hospital. The charging parties were identified as leaders of the organizational effort who had made statements on television to the effect that there was no RN coverage during certain shifts, which charging parties attributed to an ongoing dispute over salaries and benefits. The Administrative Law Judge found, with Board and court approval, that the public outburst was caused by the employer's coercive conduct and that the statements made concerning patient care created no cause for alarm by the employer and, therefore, the statements were protected.

With the teaching of the foregoing cases in mind, I have carefully reviewed the letter of Grange which is at the heart of this controversy. I find that the writing of this letter as well as Grange's subsequent activity, constitutes protected activity. Although the letter does attack the hospital's safety levels and administration, the basis for those attacks is closely tied to the working conditions of the nurses at the hospital. Grange's allegations that "only very minimal patient care is given and safety standards are stretched to the limit and beyond" are immediately tied to working conditions, i.e., poor staffing, overwork, and poor pay. The letter also notes that earlier, nonpublic suggestions and complaints had evidently fallen on deaf ears with the hospital's administration and board of trustees. I believe that it is clear from the tenor of the article that its intention was not to harass, disparage, or harm Respondent, but simply to force the administration to take heed of its employees complaints about wages and working conditions at the hospital.

Respondent, acting through its spokesman, Administrator Lotreck, admitted that the reason Grange was not employed by Respondent in June 1979 was because of the newspaper articles that appeared in the Bar Harbor Times during July 1978, all of which emanated from Grange's initially published letter of July 6, 1978. The rejection of Grange's employment for the summer of 1979 by Lotreck created controversy among the administration's personnel as manifested by the pharmacy, therapeutic, and patient care committee meeting held on April 18, 1979; joint conference committee meeting held on

May 8, 1979; executive committee meeting on May 9, 1979; and medical staffing meeting on May 10, 1979. At the joint conference meeting held on May 8, and attended by Lotreck, among others, Lotreck was quoted in Dr. Robert Beekman's (an observer) testimony to have stated relative to the subject of Grange, that it was an act of incompetence to hire someone who had been a troublemaker, who had stirred up the nurses, who had taken our problems to the newspapers and the public. Lotreck further stated at the meeting that if he had known that Dunne had hired Grange, Lotreck would not have ordered her to tell him that there was no position; but, Dunne had told Lotreck that Grange had only inquired and no position had been offered to Grange. Dunne, who was present at the meeting, accused Lotreck of not telling the truth in a heated discussion that followed, resulting in Dunne nearly offering her resignation.

Respondent urges that the primary reason for Grange not being hired was based on Grange's exit interview which was critical of Respondent's administration. Review of the exit interview reveals on its face that Grange generally liked the hospital, his coworkers, and supervisors, and the nature of his work. It also reveals that he was critical of the hospital's top administration because of working conditions, pay, and the other matters complained about in the letter to the newspaper and the petition subsequently circulated among the nursing staff. I find that from the record as a whole that Respondent refused to rehire Grange for the summer of 1979 and thereafter primarily because of Grange's published letter in the Bar Harbor Times of July 6, 1978, and the concerted activity that resulted therefrom. As noted earlier, the hospital blames Grange and the publicity surrounding the hospital that emanated from his July 6, 1978, article as causing the hospital to prematurely end its capital fund drive. I find that it is unfair to lay the death of the drive solely at the feet of Grange. Had his accusations about working and other conditions at the hospital been unfounded or patently false, the continuing criticism of the hospital that resulted from the article would not have occurred.

Are there any legitimate business reasons for not hiring Grange unrelated to his protected concerted activity which would justify Respondent's refusal to rehire him? Under the recently formulated test in *Wright Line, a Division of Wright Line, Inc.*, 251 NLRB 1083 (1980), where there is a possibility of dual or "mixed" motives in the action taken by an employer, one such being proper under the law, and the other being improper, the burden is upon the:

> . . . the General Counsel [to] make a *prima facie* showing sufficient to support the inference that the protected conduct was a "motivating factor" in the employer's decision. Once this is established, the burden will shift to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct.

I have heretofore found that Grange's protected activity is a primary reason for the employer not rehiring him. Grange's exit interview urged by Respondent as the reason for not rehiring him does not reflect an employee so unhappy with his position that one would not rehire him for that reason alone. Respondent offered a significant amount of testimony regarding the availability of positions at the hospital for which Grange was not qualified and conversely the lack of positions for which he was qualified. Respondent's Director of Nursing, Osborne, testified that Grange, on or about June 26, 1980, was not hired as a permanent full-time registered nurse because his qualifications did not meet Osborne's standards. This position is weakened significantly because subsequent to Grange's denial for permanent full-time employment by Respondent on or about June 26, 1980, Osborne offered other applicants registered nurses' positions that Grange was qualified to fill. According to the testimony of Osborne's predecessor, Louise Dunne, Grange was qualified during the summers of 1979 and 1980 to fill the nurse position of med./surg. charge nurse and/or general nurse. He was also qualified to be trained as an OB or ICU nurse. Respondent hired an applicant, Stratton, who started on July 7, 1980, as a charge nurse. She had never previously been employed by Respondent. Whatever may be the actual case with regard to the hospital's desire to hire only nurses with specialized training, I find the true state of affairs with respect to Grange to be that the hospital would not voluntarily rehire him regardless of his qualifications. Accordingly, for all the reasons set forth above, I conclude that Respondent's refusal to rehire Grange constitutes a violation of Section 8(a)(1) of the Act.

The General Counsel has also alleged that Respondent has violated Section 8(a)(4) of the Act in that the first charge filed in this proceeding by Grange was also reason for the hospital's refusal to rehire him subsequently. I cannot find any substantial evidence in this record to support this charge. As I have noted above, it is my finding that the hospital made a virtually irrevocable decision not to rehire Grange as a result of his protected concerted activities. Certainly the filing of a charge with the Board by Grange in 1979 did nothing to change the hospital's position; however, there is no evidence to establish that it modified or strengthened this position. Accordingly, I cannot find that Respondent has violated Section 8(a)(4) of the Act.

B. *Blacklisting of Grange*

Respondent's administrator, Lotreck, on or about May 2, 1979, instructed his assistant administrator, Paul O'Neill, to contact the administrator of Sonagee Estates Nursing Home and to inform him that it would be in the best interest of Sonagee if he did not hire Grange. In view of the fact that nursing positions in the small community of Bar Harbor, Maine, are limited, Respondent could naturally assume that Sonagee would be one of the few prospective places of employment in the immediate area that Grange could possibly apply. According to the uncontroverted testimony of Richird Collier, administrator at Sonagee, he received a telephone call from O'Neill on or about May 4, 1979, and was informed by O'Neill that Grange was not going to be hired at Respondent's hospital as he was a troublemaker who has caused the

hospital a lot of grief. He suggested that Collier not hire Grange. Collier immediately informed his director of nursing, Donna Cameron, about O'Neill's telephone conversation. The sum and substance of this conversation was also communicated by Collier to Grange on May 7, 1979. On May 9, 1979, Collier then communicated the content of his telephone conversation with O'Neill to Dr. Robert Beekman. The testimony clearly reflects an attempt by Respondent to blacklist Malachy Grange from employment with an prospective employer in the Bar Harbor, Maine, area. As I have found that Respondent has refused to rehire Grange because of his protected concerted activity, I likewise find that the attempt to blacklist Grange in Bar Harbor was motivated by this same concerted activity. Respondent's action in this regard further violated Section 8(a)(1) of the Act. *Harold Jackson, a sole proprietor, d/b/a Truck and Trailer Service*, 239 NLRB 1070 (1978), and *Professional Ambulance Service, Inc.*, 232 NLRB 1141 (1977). The fact that, subsequently, Respondent referred Grange to another hospital for employment does not change my finding. It is entirely consistent with Respondent's desire to get Grange out of Bar Harbor that it find him a job in some other community.

III. THE REMEDY

As I have found that Respondent did engage in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act by refusing to rehire and attempting to blacklist Malachy Grange, I shall recommend that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

I have found that by attempting to blacklist Malachy Grange with a prospective employer in the Bar Harbor, Maine, area, Respondent restrained and coerced its employee in the rights given to him in Section 7 of the Act and in violation of Section 8(a)(1) of the Act. I recommend that it cease and desist from attempting to blacklist Malachy Grange.

I have found that Respondent unlawfully refused to rehire Malachy Grange because he engaged in protected concerted activities in violation of Section 8(a)(1) of the Act. I recommend that Respondent be ordered to reemployee Grange at its Bar Harbor, Maine, hospital facility in any nursing position for which Grange is medically qualified. If no such position exists at this time, I recommend that Respondent be ordered to offer Grange employment for the first available nursing position for which he is qualified. I shall further recommend that Respondent be ordered to make Grange whole for any loss of earnings he may have suffered as a result of Respondent's unlawful refusal to hire him since June 1979, less net earnings to which shall be added interest to be computed in the manner described in *F. W. Woolworth Company*, 90 NLRB 289 (1950), and *Florida Steel Corporation*, 231 NLRB 651 (1977).

On the basis of the above findings of fact and the entire record in this case, I make the following.

CONCLUSIONS OF LAW

1. Mount Desert Island Hospital is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. By refusing to rehire its former employee, Malachy Grange, since June 1979 because of his protected concerted activities, Respondent has engaged in unfair labor practices affecting commerce within the meaning of Sections 8(a)(1) and 2(6) of the Act.

3. By attempting to blacklist its former employee, Malachy Grange, with a prospective employer in the Bar Harbor, Maine, area, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

4. Respondent did not engage in unfair labor practices within the meaning of Section 8(a)(4) of the Act as a separate violation of the Act by refusing to rehire its employee Malachy Grange.

Upon the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I issue the following recommended:

ORDER[3]

The Respondent, Mount Desert Island Hospital, Bar Harbor, Maine, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to rehire or otherwise discriminating against employees in regard to hiring or tenure of employment or any other term or condition of employment because they engage in concerted activities protected by Section 7 of the National Labor Relations Act.

(b) Attempting to blacklist its employees or in any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights to engage in or refrain from engaging in any or all of the activities specified in Section 7 of the Act.

2. Take the following affirmative action which is necessary to effectuate the policies of the Act:

(a) Employ Maiachy Grange at its Bar Harbor, Maine, hospital facility in any nursing position for which Grange is medically qualified. If no such position exists at this time, employ Grange for the first available nursing position for which Grange is qualified.

(b) Make Malachy Grange whole for any loss of earnings he may have suffered as a result of Respondent's refusal to reemploy him in the manner set forth in this decision entitled "The Remedy."

(c) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this remedial Order.

[3] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

(d) Post at its hospital facility, copies of the attached notice marked "Appendix."[4] Copies of said notice on forms provided by the Regional Director for Region 1, after being duly signed by Respondent's representative shall be posted by it immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notice is not altered, defaced, or covered by any other material.

(e) Notify the Regional Director for Region 1, in writing, within 20 days of the date of this Order, what steps Respondent has taken to comply herewith.

[4] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."